# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>December 28, 2006 |
| v | No. 263153<br>Kent Circuit Court |
| LOUIS ANTHONY WILBON,<br><br>Defendant-Appellant. | LC No. 04-004423-FH |

Before: O'Connell, P.J., and White and Markey, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of larceny by false pretenses over $20,000. MCL 750.218(5)(a). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to a prison term of 5 to 25 years, to be served consecutively after a federal prison sentence he was already serving. He appeals as of right. We affirm.

Defendant was on parole for a federal crime when he was charged with the instant offense. He first argues that dismissal was required under the interstate agreement on detainers (IAD), MCL 780.601, *et seq.*, because he was not brought to trial within 120 days after his transfer into state custody. We disagree. A trial court's decision on a motion to dismiss for violation of the IAD is reviewed for an abuse of discretion. *People v Stone*, 269 Mich App 240, 242; 712 NW2d 165 (2005). The relevant provision, Article IV, subsection (c) of MCL 780.601, states that "trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance." Here, the trial court twice adjourned trial at the prosecutor's behest, once to allow the officer in charge to attend his daughter's wedding, and a second time to allow another key witness to recover from open-heart surgery.

Although the original hearings on these motions were held off the record in chambers, defendant specifically waives review of any procedural irregularities on appeal, and only argues that there was no "good cause" supporting the delays. However, the unavailability of material witnesses is ordinarily good cause for an adjournment, MCR 2.503(C), so defendant fails to persuade us, on the record presented, that the motions for adjournment were unreasonable. Moreover, defendant fails to demonstrate any prejudice that would have rendered the delays unreasonable, especially considering that defendant himself had already requested a two-month delay of the preliminary examination. Instead, defendant merely relies on speculation for his

allegations of prejudice and the unreasonableness of the delays. To preserve these issues of unreasonableness and lack of "good cause" for our review, it was incumbent on defendant to create a record that thoroughly explored the reasons for delay and, to refute reasonableness, the anticipated harm to defendant. Defendant may not waive procedural irregularities and then rely on the resultant deficient record to speculate about the impropriety of the court's actions. See *People v Washington*, 461 Mich 294, 300; 602 NW2d 824 (1999). Under the circumstances, defendant has failed to demonstrate that the trial court abused its discretion in denying his motion to dismiss.

Defendant next argues that the trial court erred by failing to dismiss a prospective juror for cause. A trial court's ruling on a challenge for cause is reviewed for an abuse of discretion. *People v Williams*, 241 Mich App 519, 521; 616 NW2d 710 (2000). A potential juror may be challenged for cause if he or she "is biased for or against a party or attorney, . . . shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be, . . . [or] has opinions or conscientious scruples that would improperly influence the person's verdict . . . ." MCR 2.511(D)(2), (3), and (4); see also MCR 6.412(D)(1). Here, the challenged juror never made any unequivocal remark that he believed defendant was guilty or that he could not be fair. He agreed that he could base his decision on the evidence and the law. Defendant did not ask the juror any further questions to show a basis for disqualification. Giving deference to the trial court's superior ability to assess the juror's demeanor regarding whether he could be impartial, *Williams*, *supra*, the court did not abuse its discretion in denying defendant's challenge for cause.

Defendant next argues that the trial court improperly departed from the sentencing guidelines range of 5 to 46 months for reasons that were already considered in the scoring of the guidelines. We disagree. A trial court may depart from a minimum sentence within the sentencing guidelines range "if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). A trial court may not base a departure on a characteristic already taken into account in the guidelines, unless it finds that "the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b).

In this case, the trial court departed from the sentencing guidelines range because of defendant's extensive prior criminal record, the similarity of his repeated crimes, and the length of time between his supervised release and the onset of his renewed criminal conduct. Each of these reasons were objective and verifiable. Further, these factors were not adequately reflected in the scoring of the guidelines. Defendant's 13 prior felony convictions well exceeded the four necessary to receive the maximum score of 30 points for prior record variable (PRV) 2, MCL 777.52(1)(a). Defendant also received ten points for PRV 6 because he was on parole when he committed this offense, but as the trial court observed, the scoring of this variable did not reflect that defendant engaged in "virtually identical criminal conduct" or that defendant had been on parole "just a few days when this whole episode began." Under the circumstances, the trial court did not abuse its discretion in determining that there were substantial and compelling reasons to depart from the guidelines range, and the extent of the departure, 14 months, is proportionate to the seriousness of defendant's criminal conduct and his extensive criminal history. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003).

Defendant argues, in propria persona, that there was insufficient evidence to support his conviction of false pretenses over $20,000. We disagree. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Under this deferential standard, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "The elements of the crime of false pretenses are: (1) a false representation as to an existing fact, (2) knowledge by defendant of the falsity of the representation, (3) use of the false representation with an intent to deceive, and (4) detrimental reliance on the false representation by the victim." *People v Wogaman*, 133 Mich App 823, 826; 350 NW2d 816 (1984).

Here, defendant deposited an altered check for $60,000.33 and then withdrew money in amounts exceeding $20,000 that were not covered by the unsubstantiated account. Although defendant argues that the evidence was insufficient to link him to the altered check because the teller who accepted the check for deposit could not identify him in court, the teller testified that she checked the driver's license of the person who deposited the check and it conformed with defendant's name on the check and with the appearance of the customer. She also testified that she wrote defendant's account number on the check. A teller at another branch identified defendant as the person to whom she issued a $40,000 cashier's check in reliance on the $60,000 deposit. Although defendant denied depositing a $40,000 cashier's check at another branch and asserted that he deposited cash, a teller there identified a copy of the cashier's check and testified that she wrote defendant's account number and her teller number on the check when she deposited it. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find that the essential elements of the crime were proven beyond a reasonable doubt.

Defendant also argues, in propria persona, that he was denied a fair trial because the only African-American juror on his jury was dismissed before the jury began deliberations. We disagree. Although intentionally excluding a juror on the basis of race has constitutional implications, see e.g. *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), the record does not support any allegation that the juror was dismissed on the basis of race. The record discloses that 14 jurors were selected to serve on defendant's jury. The court informed the 14-member jury that only 12 jurors would deliberate and the remaining two would serve as alternates. At the conclusion of the trial, two of the jurors were dismissed, including the lone African-American juror on defendant's jury. Although defendant contends that the African-American juror was intentionally singled out for removal, the record does not support this claim. Rather, the record indicates that before the jurors were removed, the trial court repeatedly stated that the identity of the two alternate jurors would be established "purely at random." When the matter was raised after the African-American juror was excused, the court again stated that the two alternate jurors were excused "purely by lot." Defendant has not provided any support for his contention that the dismissal of the two alternate jurors was other than by random selection.

Defendant also asserts that African-Americans were underrepresented in the original jury array. Because defendant did not raise any challenge to the composition of the jury array before

a jury was selected and sworn, this issue is not preserved. *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003). Therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "To establish a prima facie violation of the fair cross-section requirement, a defendant must show that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process." *People v Smith*, 463 Mich 199, 203; 615 NW2d 1 (2000). In this case, defendant has not provided prima facie support for his claim that African-Americans were underrepresented in his venire. After the lone African-American juror was dismissed as an alternate juror, the trial court commented that, "in the original panel, we had 35 jurors, four of whom were African-Americans, which means we had a little bit more than 11 percent minority representation on the pool, which is darn close to the actual minority population of this entire county. At least four. There might have been a fifth one, I wasn't sure. But, I know there were four for sure." Under the circumstances, defendant has failed to substantiate his claim.

Defendant next argues that the trial court improperly denied his request to call two new witnesses and improperly allowed evidence of a "federal document." We review the trial court's evidentiary decisions for abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). Neither of the two witnesses defendant desired to call was identified on defendant's witness list, and defendant had not made any arrangements to secure the presence of one of them. Although defendant maintains that the witnesses would have rebutted evidence of defendant's involvement in other criminal activities, defendant had already admitted the behavior in his testimony. Defendant testified that, in the past, he had engaged in fraudulent activity to support his gambling addiction and had worked as a courier for organized crime doing money laundering and narcotics dealing. Defendant's purpose in calling one of the witnesses was to support his theory that the officer in charge was a member of an organized crime ring. According to defendant's offer of proof, however, the witness would merely have testified that defendant previously refused to reveal the identify of a man who allegedly was involved in the drug trade. The proposed testimony would not have established the detective's identity as this unnamed person. Under the circumstances, the trial court did not abuse its discretion in denying defendant's request to call the two unnamed witnesses. MRE 403.

Finally, the record does not support defendant's claim that the prosecution was allowed to introduce a highly prejudicial federal document. In his testimony, defendant claimed that the officer in charge was a member of a crime organization known as "The Group." The only reference to the alleged federal document occurred when the detective testified in rebuttal that he was familiar with an organization known as "The Group" from reviewing a federal document about defendant's criminal history. This reference was hardly prejudicial given defendant's extensive direct testimony that he was a member of "The Group" under the detective's supervision. MRE 103(a). The detective stated that he did not read his own name on the document, and could not recollect seeing the names of others accused by defendant either. No further reference to the document was made. The detective denied being part of "The Group," contrary to defendant's testimony. The trial court specifically precluded the prosecutor from delving into the substance of the federal document, so the facts do not support defendant's claim of error.

Affirmed.

/s/ Peter D. O'Connell
/s/ Jane E. Markey